United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

S.A.M. DATE: May 8, 2014

TO: Claude T. Harrell, Jr., Regional Director
Region 10

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Faurecia Interior Systems
Case 10-CA-112263

512-5006-5050
512-5006-5063
512-5006-5065

The Region seeks advice on whether this case, in which the Employer made preelection statements to employees that misrepresented employees' Section 9(a) right to direct access to the Employer, is an appropriate vehicle in which to urge the Board to reexamine its broad application of its decision in *Tri-Cast, Inc.*[1] We conclude that the facts of this case provide a good opportunity to argue that the Board limit its application of *Tri-Cast*, and hold that preelection statements that explicitly misrepresent employee rights under Section 9(a) are unlawful threats of the loss of existing benefits. The Region should therefore amend its outstanding complaint to allege, absent settlement, that the Employer's preelection statements were Section 8(a)(1) threats.

FACTS

The Employer manufactures automotive parts in Tuscaloosa, Alabama. In April 2013,[2] the UAW (Union) began to organize the Employer's 162 production and maintenance employees. During the Union campaign, the Employer held mandatory captive-audience meetings with employees during which it informed them that they would no longer be able to meet with the Employer directly about work-related issues after a Union victory. The Employer's (b) (6), (b) (7)(C) stated at a meeting that:

> [I]f there was a union, the company would lose all flexibility to assist employees with work-related issues … [e.g.,] if an employee came in a minute or so late and got an attendance point, the company would have no discretion to work with the employee to remove it or discuss

[1] 274 NLRB 377 (1985).

[2] All dates are in 2013 unless noted.

> any possible excuses or adjustments and instead, employees would have to go to their elected shop steward and file a grievance to get an adjustment…. [I]f [employees] voted in a union, there would be no direct contact allowed between supervisors, managers and employees, that having a union would destroy the relationship [they] had, that any questions [employees] had about work would have to be addressed to [their] stewards who would be the only ones who could talk for [employees], that [they] would no longer be able to have direct contact.

The Employer's (b) (6), (b) (7)(C) also told employees that:

> [E]mployees would not have their own voice, the union would be [employees'] voice, [employees] could no longer come to HR or the plant manager and talk to them about [their] problems, [they] would only be allowed to do that through a union representative.

Further, the Employer's (b) (6), (b) (7)(C) informed employees at a meeting that:

> You can't just come to me anymore. You have to go to your union rep. Then you have to wait until your union rep has time to come to meet with me. And who's to say you can trust the union rep? Why would you want to put your job in somebody's hands to talk about the hiring and firing process.

During these captive-audience meetings, the Employer also used PowerPoint slides that included statements warning employees, in part, that, "[c]ooperation and teamwork will be replaced by conflict" and "[r]elationships with employees will become more adversarial and less friendly."

The Union lost the election on August 22 by a vote of 62-86, with 9 challenged ballots.

The Region has issued complaint alleging that the Employer committed numerous Section 8(a)(1) violations during the Union campaign, including interrogating employees, threatening employees with plant closure, discharge, blacklisting, and loss of work, making statements of futility, restricting pro-union employees' movement within the plant, and promising employees benefits if they voted against the Union.[3] The complaint also alleges that the Employer disciplined a

[3] The need and propriety for Section 10(j) relief is addressed in a separate memorandum.

prounion employee in violation of Section 8(a)(3). The Region seeks advice on whether to amend the complaint to allege that the Employer's statements concerning the employees' right to deal directly with the Employer after unionization, including those contained in its PowerPoint presentation, violated Section 8(a)(1).

ACTION

We conclude that this case is a good vehicle in which to urge the Board to reexamine its application of *Tri-Cast*. Thus, although the Employer's statements would likely be found lawful under the Board's broad application of *Tri-Cast*, the Region should amend its complaint to allege that the Employer's preelection statements, warning employees that they would be unable to approach the Employer directly if the Union won the election, were clear misrepresentations of their rights under Section 9(a) and therefore were unlawful threats of the loss of existing benefits in violation of Section 8(a)(1).

Background Legal Principles

In *Gissel,* the Supreme Court delineated the line between employer speech protected under Section 8(c) of the Act and threats of reprisals violative of Section 8(a)(1).[4] Thus, Section 8(c)'s protection of the expression of "any views, argument, or opinion" leaves an employer free to communicate "his general views about unionism" and to make "a prediction" as to the effects of unionization, but that prediction "must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control[.]"[5] On the other hand, "a threat of retaliation based on misrepresentation and coercion" is beyond the protection of Section 8(c) and violates Section 8(a)(1).[6]

Section 9(a) provides that a union selected by a majority of unit employees is granted exclusive representative status for the purposes of collecting bargaining regarding the terms and conditions of employment of the unit employees. The proviso to Section 9(a) guarantees, however, that represented employees have the ability to bring individual or group grievances to their employer, and that the employer may adjust such grievances, as long as the adjustment is consistent with any applicable

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[4] *See NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969).

[5] *Id.*

[6] *Id.*

collective-bargaining agreement and the union is given an opportunity to be present at the adjustment.[7]

Before *Tri-Cast*, the Board held that employer statements that misrepresented employees' Section 9(a) right to deal directly with the employer after designation of an exclusive union representative violated Section 8(a)(1) or were objectionable preelection conduct.[8] The Board typically characterized employer statements misrepresenting employees' Section 9(a) rights as threats of the loss of an existing benefit, since Section 9(a) guarantees that employees who were allowed to approach their employer directly when they were unrepresented will be able to do so after they

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[7] The complete proviso to Section 9(a) states:

Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

[8] *See, e.g.*, *Joe & Dodie's Tavern*, 254 NLRB 401, 406, 411 (1981) (Board affirmed ALJ's conclusion that employer's statements that employees "absolutely cannot" deal directly with employer because employer was "legally obligated to deal solely" with union conveyed an "erroneous statement of the law" and threatened loss of benefits in violation of Section 8(a)(1)), *enfd.* 666 F.2d 383 (9th Cir. 1982); *LOF Glass, Inc.*, 249 NLRB 428 (1980) (employer's statement that "the right and the freedom of each of you to come in and settle matters personally would be gone" was a "serious misrepresentation" of employees' right under 9(a) and objectionable conduct sufficient to warrant setting aside election); *Colony Printing and Labeling*, 249 NLRB 223, 224 (1980) (employer's statements that "[i]f you sign your name to a union card, you give up the right to talk to us ... [w]hen you sign, you give away your right to talk to us about your pay, your benefits, the hours you work, and about your job" were "misstatements of the law which constitute threats … to curtail employee rights and discontinue employee benefits" violative of Section 8(a)(1)), *enfd.* 651 F.2d 502, 504 (7th Cir. 1981); *Robbins & Myers, Inc.*, 241 NLRB 102, 103-104 & n.7 (1979) (employer's statement that when union comes in, "employees lose all rights for direct communication with the [employer]" was a "misrepresentation" of Section 9(a)), *enfd.* 653 F.2d 237 (6th Cir. 1980). *Compare Westmont Eng'g Co.*, 170 NLRB 13, 13 (1968) (employer's statement that employer must handle any grievances through union if union won election, although not "entirely accurate," was not coercive and did not violate Section 8(a)(1)).

unionize.[9] To determine whether such employer statements were misleading and coercive, the Board often considered the circumstances in which the statements were made, including employer warnings that its relationship with employees would deteriorate if the employees chose representation.[10] For example, in *Tipton Electric Company,* the Board affirmed the Administrative Law Judge's conclusion that the employer violated Section 8(a)(1) when it made statements to employees to the effect that they would "lose your right to speak and act as individuals" and could "no longer go directly to their management," while also implying that, with a union, the existing

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[9] *See, e.g.*, *Associated Roofing & Sheet Metal Co.*, 255 NLRB 1349, 1350 (1981) (employer's statement that "the right and freedom of each employee to come in and settle matters personally would be gone" was threat to terminate existing benefit and constituted objectionable conduct); *Joe & Dodie's Tavern*, 254 NLRB at 406, 411; *Armstrong Cork Co.*, 250 NLRB 1282, 1282 (1980) (employer's statement that "you will decide whether you want to give up your right to … deal directly with me or your supervisor as you have in the past" was unlawful threat of loss of existing benefit and objectionable); *Sacramento Clinical Laboratory*, 242 NLRB 944, 944 (1979) (employer's statement that employee would no longer be able to talk with employer but must go "through channels" was a "clear misstatement" of Section 9(a) and an unlawful threat of loss of benefits), *enforcement denied in relevant part* 623 F.2d 110, 112 (9th Cir. 1980); *Graber Mfg. Co.*, 158 NLRB 244, 246-47 (1966) (Board affirmed ALJ's finding that employer's statement that union vote would determine whether employees would "continue to talk about your own job affairs *personally* or a third party—the [u]nion—will do your talking for you, to *your exclusion*" violated Section 8(a)(1) because it threatened loss of existing benefit) (emphasis in the original), *enfd.* 382 F.2d 990 (7th Cir. 1967). *Cf. K.O. Steel Casting, Inc.*, 172 NLRB 1837, 1837 (1968) (employer's statement that union would "break up our home, so to speak, because we would not be dealing together, but would have to deal through a third party" was not a threat of retaliation but rather employer's opinion).

[10] *See, e.g.*, *Greensboro News Co.*, 257 NLRB 701, 701 (1981) (employer's statement that although at present, supervisors and managers could deal with employees as individuals, if the union came in employer "must deal with [union], not you" was, in the context of other statements that employees would be "worse off," an unlawful threat to terminate existing beneficial situation); *Tipton Elec. Co.*, 242 NLRB 202, 203, 205-206 (1979) (Board affirmed ALJ's finding that employer's statement conveyed message that employer's harmonious relationship with employees would cease if union voted in), *enfd.* 621 F.2d 890, 892 (8th Cir. 1980). *See also Sacramento Clinical Laboratory*, 242 NLRB at 944 (employer's statement conveyed that all direct dealing with employees would be banned, especially where made one-on-one in employer's office to newly appointed employee negotiator).

harmony between the employer and its employees would no longer exist because "normal friendships between [employees] and the manager are forced out."[11]

Tri-Cast and its Progeny

The Board changed course in *Tri-Cast*, where it disagreed with the Regional Director's conclusion that the employer's statement misrepresented employees' Section 9(a) rights and thereby constituted an objectionable threat to revoke an existing employee benefit.[12] In *Tri-Cast*, the employer had distributed to employees, on the day of the election, a letter stating in part:

> We have been able to work on an informal and person-to-person basis. If the union comes in this will change.
>
> We will have to run things by the book, with a stranger, and will not be able to handle personal requests as we have been doing.[13]

The Board concluded that the employer's statement did not threaten to take away an existing benefit but, rather, explained the employer's view of how its relationship with the employees would change if they unionized.[14] The Board noted that, because Section 9(a) contemplates changes to the employer-employee relationship, the employer's statement was not a threat to withdraw existing benefits but merely a recognition that its relationship with the employees would "not be as before" the employees sought representation.[15]

In support for its rationale—and despite the widespread appellate success otherwise enjoyed by the Board in prior decisions involving this issue—the *Tri-Cast* Board cited the Ninth Circuit's 1980 opinion in *NLRB v. Sacramento Clinical Laboratory*.[16] In that case, the court disagreed with the Board's conclusion that an

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[11] 242 NLRB at 203, 205-206.

[12] *Tri-Cast*, 274 NLRB at 377.

[13] *Id.*

[14] *See id.*

[15] *Id.*

[16] *Id.*, *citing* 623 F.2d 110, 112 (9th Cir. 1980).

employer's statement to an employee that, "if the [u]nion came in she would not be able to come to talk to [employer] as she had, but would have to go through channels" was a "clear misstatement" of employees' Section 9(a) rights and, thus, an unlawful threat of loss of existing employee benefits.[17] Instead, the court characterized the employer's statement as merely a reminder of one consequence of unionization, noting that changes to an employer's relationship with its employees was a "fact of industrial life."[18]

Significantly, the *Sacramento* Court did not suggest disagreement with the Board's reasoning that an employer's statement constitutes a threat if it is a "clear misstatement" of employees rights under Section 9(a). Rather, the court declined to enforce the Board's decision for lack of sufficient evidence.[19] Indeed, two years after *Sacramento*, the Ninth Circuit enforced a Board order adopting the ALJ's conclusion that the employer had threatened employees with a loss of benefits when it communicated "an erroneous statement of the law" by telling them they would "absolutely" lose all direct access to management if they chose representation because the employer would then be "legally obligated to deal solely" with the union.[20]

Even recognizing the Ninth Circuit's *Sacramento* decision, the *Tri-Cast* Board could have narrowly construed its holding that an employer's statement that merely depicts how its relationship with employees will change with the advent of a union does not threaten employees with a loss of an existing benefit.[21] Indeed, the employer's statement in *Tri-Cast* did not convey that *all* employee access to the employer would be denied, but simply forecast a more formal relationship with employees if they selected a bargaining representative. But the *Tri-Cast* Board

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[17] 242 NLRB 944, 944 (1979), *enforcement denied in relevant part* 623 F.2d 110 (9th Cir. 1980).

[18] *See* 633 F.2d at 112, *citing Bostitch Div. of Textron*, 176 NLRB 377, 379 (1969), in which the Board affirmed without comment the ALJ's conclusion that the employer's statement that, "you had the right to speak for yourself and settle with us personally any problems you have … [b]ut if this [u]nion were to get in here, this freedom and this right would be taken away from you" did not threaten reprisal against employees, but merely reflected the union's Section 9(a) rights to adjust grievances, "a fact of industrial life."

[19] 623 F.2d at 112.

[20] *Joe & Dodie's Tavern*, 254 NLRB at 406, 411, *enfd.* 666 F.2d 383 (9th Cir. 1982).

[21] *Tri-Cast*, 274 NLRB at 377.

specifically overruled the three prior decisions relied on by the Regional Director in finding the employer's statement objectionable, thereby signaling that the Board no longer viewed employer misrepresentations of employees' Section 9(a) rights as unlawfully coercive.[22]

Consistent with that signal, the Board has applied its *Tri-Cast* rationale broadly, privileging employer statements that, unlike those in *Tri-Cast* itself, were direct misrepresentations of employees' rights guaranteed by Section 9(a). For instance, in *United Artists Theatre*, the Board dismissed the Section 8(a)(1) allegation challenging the employer's statements that if the union won the election, the employer would "be obligated by law to discuss grievances only with the [u]nion, not with you" and "[y]ou have always had the right to deal directly with the management of our Company [but] [s]hould this [u]nion get in, you will have voted away that right…."[23] Later, in *SMI Steel*, the Board found lawful an employer's statement to employees that if they voted for representation, "[y]ou would not be permitted to take advantage of an opportunity to come all the way to my front office and sit down and talk to me, because you would be prevented from doing that under the contract…."[24] The employer statements in *United Artists Theatre* and *SMI Steel*, unlike the employer statement in *Tri-Cast*, do not predict a mere change in the employers' relationships with their employees, but rather, explicitly convey to employees that they will not have the rights provided by Section 9(a) if they vote for representation.[25]

Indeed, as Member Block noted in her concurrence to the Board's 2012 decision in *Dish Network Corporation*, *Tri-Cast* has proven to be a "blunt instrument, applied in such a broad fashion that almost any statement" concerning employees' Section 9(a) rights is permissible.[26] In *Dish Network*, the employer told its employees that

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[22] *See id.* at 377 n.5 (overruling *Greensboro News Co.*, 257 NLRB 701 (1981); *Armstrong Cork Co.*, 250 NLRB 1282 (1980); and *LOF Glass, Inc.*, 249 NLRB 428 (1980)).

[23] 277 NLRB 115, 115 (1985).

[24] 286 NLRB 274, 274 n.3 (1987).

[25] *See, e.g.*, *Ben Venue Laboratories*, 317 NLRB 900, 901-902 (1995) (Member Browning, dissenting in part) (rationale underlying *Tri-Cast* does not privilege employer statements that go beyond explicating a change in the employer-employee relationship by threatening total elimination of employer's open-door policy), *enfd. mem.* 121 F.3d 709 (6th Cir. 1997).

[26] *Dish Network Corp.*, 358 NLRB No. 29, slip op. at 3 (Member Block, concurring in part) (April 11, 2012).

"they would be limited in bringing concerns to management if they selected the [u]nion as their exclusive bargaining representative."[27] Although we would characterize the employers' statements in *Dish Network* and *Tri-Cast* as lawful predictions of how the employers' relationships with employees might change, we agree with Member Block that the Board should revisit its application of *Tri-Cast* and again hold that employer statements that explicitly misrepresent employees' Section 9(a) rights constitute coercive threats of loss of benefits under Section 8(a)(1).

The Instant Case

We conclude that this case presents an opportunity for the Board to reexamine its application of the *Tri-Cast* doctrine. The Employer's statements do not merely predict a change in the Employer's relationship with its employees, but threaten them with the complete elimination of access to the Employer, and a more adversarial workplace, if they vote for the Union. Thus, the Employer told employees that, "there would be no direct contact allowed between supervisors, managers and employees," "[employees] could no longer come to HR or the plant manager and talk to them about [their] problems, [they] would only be allowed to do that through a union representative," and "[y]ou can't just come to me anymore. You have to go to your union rep." Those statements clearly misrepresent Section 9(a), and are thus unlawful threats to employees that they will no longer have the ability to bring concerns directly to the Employer once they are represented.[28] The Employer's PowerPoint statements that "[c]ooperation and teamwork will be replaced by conflict" and "[r]elationships with employees will become more adversarial and less friendly" forecast a more acrimonious relationship that is neither "demonstrably probable" nor beyond the Employer's control,[29] and, coupled with its clear misstatements of Section 9(a), also constituted coercive threats violative of Section 8(a)(1).[30] We note finally that the Employer's misrepresentations of employees' Section 9(a) rights and its

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[27] *Id.*, slip op. at 1 n.1. The Board affirmed the ALJ's dismissal of the allegation that the employer's statement violated Section 8(a)(1), and noted that a review of the merits of *Tri-Cast* was not properly before it. *See id.*

[28] *See, e.g.*, cases cited in nn.8-9, above.

[29] *See NLRB v. Gissel Packing Co.*, 395 U.S. at 618.

[30] *See Greensboro News Co.*, 257 NLRB at 701 (employees would be "worse off" if employer "must deal with [union]"); *Tipton Elec. Co.*, 242 NLRB at 206 (employer's harmonious relationship with employees would cease if union voted in); *Graber Mfg. Co.*, 158 NLRB at 246-49 (same).

attendant prediction of adverse consequences were made in the context of its vigorous antiunion campaign that was rife with other Section 8(a)(1) and (3) violations.

Accordingly, the Region should amend its outstanding complaint to allege, absent settlement, that the Employer's statements constituted unlawful threats of the loss of existing benefits in violation of Section 8(a)(1).

/s/
B.J.K.

H:ADV.10-CA-112263.Response.faurecia.[redacted]

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: June 10, 2015

TO: Jonathan B. Kreisberg, Regional Director
Region 1

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: FCi Federal
Cases 01-CA-135247, 143853

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512-5006-5035-0000
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512-5006-5065-0000

The Region submitted this case for advice as to whether it is an appropriate vehicle in which to request that the Board reconsider the broad application of its decision in *Tri-Cast, Inc.*,[1] which concerns whether employer statements about the impact of unionization on employee direct access to management constitute unlawful threats of retaliation. We conclude that this case presents an appropriate vehicle to urge the Board to hold that employer statements which misrepresent employees' statutory rights under Section 9(a) of the Act, or which impliedly threaten employees with a loss of access to management, violate Section 8(a)(1). As a result, we conclude that a number of the Employer's statements in the present case constituted unlawful threats. Apart from that analysis, we further conclude that the Employer made a number of unlawful promises of benefits. The Region should therefore issue complaint regarding the aforementioned violations.

FACTS

FCi Federal ("the Employer") is a government contractor with 125 offices nationwide through which it provides field office support services to several Federal Government agencies. The Employer has over 2,000 of its own employees and about 1,000 subcontractor employees throughout its operation. It is a party to collective-bargaining agreements covering employees at five of its locations. In the spring of 2014,[2] the Employer was awarded a contract to take over operations at the National Visa Center in Portsmouth, New Hampshire, which includes a workforce

[1] 274 NLRB 377 (1985).

[2] All subsequent dates are in 2014.

of 550 employees processing non-immigrant visas and providing other services for the U.S. Department of State.

Before the Employer officially took over operation of the Portsmouth center, the United Electrical, Radio, and Machine Workers of America ("the Union") began an organizing campaign there. The Employer immediately responded with a vigorous campaign opposing the Union.[3] The Employer hired an outside labor consultant, launched a "Get the Facts" website, and provided guidance to supervisors of the predecessor employer on how to discuss the Union with employees. The Employer also sent a number of mailings directly to employees, including two letters dated April 24 and May 21.

In the April 24 letter to employees, the Employer's [redacted] discussed the ongoing transition at the facility, noting that the Employer had already "worked hard to respond to your questions and to assure you that the transition to [the Employer] will be a positive one," and that the Employer was "working hard to create the changes that many of you want." The Employer's [redacted] went on to discuss the Union organizing campaign and stated in part that: "The number one difference with a unionized environment is that you will not have the pleasure of working with me or my leadership team directly. You will have to go through the [U]nion to have a relationship with us." The letter went on to state:

> So I ask each of you to ask yourself one question: Did you like what you heard from me in terms of the kinds of changes we plan to make at the [National Visa Center]? If the answer is yes, then please give us the chance to show you directly our management and operating philosophies in action – do not sign union cards – allow us the opportunity to have that direct relationship with you. . . . I can assure you that if a union is voted in at [the National Visa Center], we will be unable to implement many of those management changes that I have been talking about – because the union will be in between you and me. It will be the union who will represent you and I will not be allowed to provide you the kind of work environment and culture that I promised – and that I would have delivered on otherwise.

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[3] The Region already has determined that the Employer engaged in a variety of actions violating Section 8(a)(1), including threatening employees with a loss of employment, promising to improve working conditions if the Union was kept out, threatening employees with deteriorating working conditions as a result of the Union, threatening that bargaining would be futile, soliciting employees to revoke their union cards, and promulgating a number of overbroad employee handbook rules.

In the May 21 letter, the Employer's [redacted] stated: "I would like to take just a few minutes of your time to state that the National Visa Center in New Hampshire is currently non-union and we believe it is not in the best interest of our future employees and our company to have an outsider come between us. We believe that an outsider would not improve how we treat our employees, but instead, could be divisive." The letter continued:

> We intend to remain union-free by responding to your needs and concerns. We know there have been management issues as I've read your emails and your letters of concern and we will work to make the changes needed that will improve the quality of life at the [National Visa Center]. . . . To that end, we will be seeking your input on ways in which we can improve on work processes and management practices, your opinion and voice matters to us.
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> * * *
>
> **In a union-free environment, we will have the opportunity to work with you to make the necessary changes to improve how the site is managed. In a unionized environment, we may not have that opportunity.** (Emphasis in original.)

On June 23, the Employer officially took over operation of the National Visa Center in Portsmouth. One week later, the Employer's [redacted] flew to the facility and held a series of mandatory captive-audience meetings with employees on June 30 and July 1. According to employee testimony, the Employer's [redacted] stated in part that if the Union came in the employees could no longer have a direct personal working relationship with the Employer, that everything would be filtered through the Union, and that employees would not be able to talk to the Employer's [redacted] or any of the management staff without the Union being present. According to the Employer's [redacted] prepared notes included remarks that: "once you have a union in place, it changes the relationship between us and you, you have a third party who will represent you, who will make decisions and negotiate on your behalf, and our relationship changes and is not as direct because you have a third party between us." Several employees also recalled that the Employer's [redacted] held up pictures of the Union organizing committee members and stated that they wanted to be the employees' new bosses.

In early July, the Employer's [redacted] sent employees a third letter that used the analogy of a bad "roommate" to suggest that the Union made promises that it could not keep, took credit for the accomplishments of others, and always found fault in others. In reference to the Union, the letter stated in part: "They will drive a wedge between my leadership and you."

ACTION

We conclude that this case presents a good vehicle to urge the Board to reconsider its application of the *Tri-Cast* case and to hold that the type of employer statements involved here are unlawful. In particular, we conclude that the Employer's statement in its April 24 letter that employees would "have to go through the union to have a relationship with us," and its (b) (6), (b) (7)(C) statements during the captive-audience meetings on June 30 or July 1 that employees could no longer have a direct personal relationship with management, that everything would be filtered through the Union, and that employees would no longer be able to talk to management without the Union being present, misrepresented employees' statutory rights under Section 9(a) and constituted unlawful threats of retaliation in violation of Section 8(a)(1).

This memorandum first sets out the background legal principles underlying our analysis, specifically the framework under which employer misrepresentations of statutory rights are found to violate Section 8(a)(1), and the rights reserved to individual employees in Section 9(a). Second, we explain how the development of Board precedent in this area has led to an overbroad application of *Tri-Cast* that undermines employee Section 7 rights. Third, we illustrate how the current case is a good vehicle for the Board to narrow its application of *Tri-Cast* and return to its prior reasoning that employer misrepresentations of Section 9(a) rights are unlawful threats of retaliation.

Finally, we conclude that several statements by the Employer, while not implicating *Tri-Cast* or its progeny, constituted unlawful promises of benefits in violation of Section 8(a)(1).

I. BACKGROUND LEGAL PRINCIPLES

A. The Framework for Determining Whether Employer Misrepresentations of Employee Statutory Rights Constitute Unlawful Threats of Retaliation.

Although Section 8(c) protects the right of employers to express certain "views, argument, or opinion" without committing an unfair labor practice,[4] in *NLRB v. Gissel Packing Co.* the Supreme Court clarified the point at which an employer's statement becomes an unlawful "threat of reprisal or force or promise of benefit" outside the protections of Section 8(c) or the First Amendment.[5] Thus, employers may make lawful predictions about the effects of unionization when such predictions are

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[4] 29 U.S.C. § 158(c) (2012).

[5] 395 U.S. 575, 618 (1969).

"carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control."[6] The Board has clarified that for a prediction to be lawful it must be both "based on objective fact *and* address consequences beyond an employer's control."[7] In contrast, a statement will run afoul of the Act when "there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him," such that the statement constitutes a "threat of retaliation based on misrepresentation or coercion."[8] In this larger framework, the Board has held that employer statements that misrepresent employee rights under the Act and lead employees to believe that the employer is privileged to take some unlawful action in response to their union activities constitute threats of retaliation for engaging in those activities, and therefore violate Section 8(a)(1).[9]

B. Section 9(a) and the Continuing Right of Employees to Present and Adjust Grievances on Their Own.

Section 9(a) of the Act grants certified bargaining representatives the authority to serve as the exclusive representative of all employees in a given unit, but it also contains two provisos qualifying such exclusivity. Those two provisos state:

> [t]hat any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have

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[6] *Id.*

[7] *DHL Express, Inc.*, 355 NLRB 1399, 1400 (2010) (emphasis in original) (citing *Systems West, LLC*, 342 NLRB 851 (2004)).

[8] *Gissel Packing Co.*, 395 U.S. at 618.

[9] *See, e.g.*, *Baddour, Inc.*, 303 NLRB 275, 275 (1991) (finding employer coerced employees in violation of Section 8(a)(1) by stating during organizing campaign that "union strikers can lose their jobs . . . by being replaced with a new permanent worker"; statement misrepresented the reinstatement rights of economic strikers); *Vemco, Inc.*, 304 NLRB 911, 913, 925-26 (1991) (finding employer coerced employees by misrepresenting that it could lawfully close its plant in response to an organizing drive and reopen with new employees), *enforced in relevant part*, 989 F.2d 1468 (6th Cir. 1993); *Emergency One*, 306 NLRB 800, 800 (1992) (finding employer violated Section 8(a)(1) where supervisor told employee "it's a right to work state and the company doesn't have to negotiate with the union"; the statement was contrary to law and employees could have interpreted it as a threat that the employer would not bargain even if the employees elected the union).

> such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.[10]

When the Wagner Act was enacted in 1935, Section 9(a) contained only a single proviso stating that individual employees or groups of employees would still be permitted to "present" grievances to their employer.[11] The Board initially interpreted this proviso narrowly, and by the mid-1940s, the Board had decided that, while individual employees had the right to communicate grievances to management, the employer and the individual employee could not lawfully resolve such grievances without going through the union.[12]

During the drafting of the Taft-Hartley Amendments in 1947, Congress sought to correct the Board's perceived misinterpretation of the existing proviso, and to protect important "rights of workers," by amending Section 9(a).[13] The initial version of the bill added language to the 1935 proviso clarifying that individual employees had the right to present *and* settle grievances "without the intervention of the bargaining representative if the settlement is not inconsistent with the terms of a collective-bargaining agreement then in effect."[14] Congress was specifically acting to counter "what many had deemed the unlimited power of the union to control the processing of grievances."[15] As a final compromise meant to address concerns about the resulting

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[10] 29 U.S.C. § 159(a) (2012).

[11] 29 U.S.C. § 159(a) (1935) ("Provided, That any individual employee or group of employees shall have the right at any time to present grievances to their employer.").

[12] *See, e.g.*, *Hughes Tool Co.*, 56 NLRB 981, 982-83 (1944), *enforced as modified*, 147 F.2d 69 (5th Cir. 1945); *see also* H.R. Rep. No. 80-245, at 34 (1947), *reprinted in* 1 NLRB, Legislative History of the Labor-Management Relations Act, 1947, at 325 (1948) ("Putting a strange construction upon [the existing] language, the Labor Board says that while employees may 'present' grievances in person, the representative has the right to take over the grievances.").

[13] *See* H.R. Rep. No. 80-245, at 6-7 (1947), *reprinted in* 1 NLRB, Legislative History of the Labor-Management Relations Act, 1947, at 298 (1948).

[14] *Id.* at 346; *see also id.* at 298 (clarifying distinction between the existing Board law and the "freedom of workers" guaranteed by the proposed amendment).

ability of employers to undermine the status of the exclusive representative through the unilateral settlement of grievances, a second proviso was ultimately added to the bill, with the limited requirement "[t]hat the bargaining representative [be] given opportunity to be present at such adjustment."[16]

As a result, following passage of the Labor-Management Relations Act in 1947, Section 9(a) now contains the two provisos set forth above clarifying that after the certification of an exclusive bargaining representative, individual employees enjoy a continuing right to present and adjust grievances with their employer, "without the intervention of the bargaining representative," so long as any adjustment reached does not contradict a collective-bargaining agreement then in effect and the bargaining representative is given an opportunity to be present. Thus, even when a majority union is in place, employees retain the Section 7 right to present grievances directly to their employer without going through the union, and employers retain the discretionary ability to adjust such grievances with individual employees subject to the narrow procedural requirements of the Section 9(a) provisos.

II. DEVELOPMENT OF BOARD PRECEDENT REGARDING EMPLOYER MISREPRESENTATIONS OF SECTION 9(a) RIGHTS

A. Early Board Precedent Finding that Misrepresentations of Section 9(a) Rights Constituted Unlawful Threats of Loss of Benefits.

Through the 1960s and early 1970s, the Board often vacillated in its treatment of employer statements regarding the impact of unionization on employees' access to management, and in its conclusions as to the lawfulness of such statements.[17] Despite

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[15] *Black-Clawson Co. v. Machinists Lodge 355*, 313 F.2d 179, 185 (2d Cir. 1962); *see, e.g.*, H.R. Rep. No. 80-245, at 6-7 (1947), *reprinted in* 1 NLRB, Legislative History of the Labor-Management Relations Act, 1947, at 297-98 (1948) (referencing a perceived need to amend the original Act due, in part, to the alleged "dictatorial control of workers by unscrupulous union leaders").

[16] S. Rep. No. 80-105, at 36 (1947), *reprinted in* 1 NLRB, Legislative History of the Labor-Management Relations Act, 1947, at 442 (1948); *Valencia Baxt Express, Inc.*, 143 NLRB 211, 217 (1963) (noting that the second proviso was added "only after it was pointed out that absent such a requirement, employers would have available a ready means of 'undermining the status of the duly chosen bargaining representative'" (quoting H.R. Min. Rep. No. 80-245, at 85 (1947))).

[17] *Compare Saticoy Meat Packing Co.*, 182 NLRB 713, 715 (1970) (finding statements unlawful); *Henry I. Siegel Co., Inc.*, 172 NLRB 825, 829, 837 (1968) (same); *Winn-Dixie Stores, Inc.*, 166 NLRB 227, 234 (1967) (same), *with Gertz*, 197 NLRB 718, 723

the similarity of the statements at issue in different cases, the Board at times treated them as no more than lawful predictions that "employees would have to work through their union representative in resolving their grievances,"[18] and at other times as unlawful threats that employees "would lose a substantial benefit" in the form of the right to present grievances directly to management.[19] One administrative law judge observed "two separate lines of Board cases relating to the lawfulness of such remarks . . . [that are] difficult if not impossible to reconcile."[20]

However, by the late 1970s and early 1980s, the Board began to consistently find unlawful employer statements that misrepresented the legal principles contained in Section 9(a) by implying that the introduction of a union would prevent employees from maintaining a direct relationship with management.[21] The Board recognized

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(1972) (finding statements lawful); *Bostitch Div. of Textron, Inc.*, 176 NLRB 377, 379 (1969) (same); *National Bookbinding Co.*, 171 NLRB 219, 220 (1968) (overruling election objection).

[18] *Skirvin Hotel & Skirvin Tower*, 142 NLRB 761, 763 (1963) (reversing trial examiner to find employer's statement that employees would lose "privilege of discussing matters with management," and would have to "go to a union man" and "wait for him" and "if he didn't want to come, he wouldn't have to come," to be lawful).

[19] *Graber Manufacturing Co., Inc.*, 158 NLRB 244, 246-47 (1966) (affirming trial examiner's conclusion that employer's statement that employees would lose ability to personally talk about their own job affairs and that the union "will do your talking for you, to *your exclusion*" to be contrary to Section 9(a) and thus an unlawful threat of retaliation), *enforced*, 382 F.2d 990 (7th Cir. 1967).

[20] *Sacramento Clinical Laboratory, Inc.*, 242 NLRB 944, 948 (1979) (citing cases), *enforcement denied in relevant part*, 623 F.2d 110 (9th Cir. 1980).

[21] *E.g.*, *Mead Nursing Home, Inc.*, 265 NLRB 1115, 1115-16 (1982) (sustaining election objection); *Economy Fire & Casualty Co.*, 264 NLRB 16, 20 (1982); *Gould, Inc.*, 260 NLRB 54, 54 n.3 (1982); *Greensboro News Co.*, 257 NLRB 701, 701 (1981) (sustaining election objection); *Associated Roofing & Sheet Metal Co.*, 255 NLRB 1349, 1350 (1981) (sustaining election objection); *Limestone Apparel Corp.*, 255 NLRB 722, 728 (1981), *enforced*, 705 F.2d 799 (6th Cir. 1982); *Joe & Dodie's Tavern*, 254 NLRB 401, 411 (1981), *enforced sub. nom.*, *NLRB v. Dick Seidler Enterprises*, 666 F.2d 383 (9th Cir. 1982); *Ducane Heating Corp.*, 254 NLRB 112, 112 n.2 (1981), *enforced mem.*, 665 F.2d 1039 (4th Cir. 1981); *G.F. Business Equipment, Inc.*, 252 NLRB 866, 871 (1980), *enforced mem.*, 673 F.2d 1314 (4th Cir. 1982); *Armstrong Cork Co.*, 250 NLRB 1282, 1282 (1980) (sustaining election objection); *LOF Glass, Inc.*, 249 NLRB 428, 428-29 (1980) (sustaining election objection); *Colony Printing & Labeling, Inc.*, 249

that Section 9(a) authorizes certain changes to the employee-employer relationship, such as the requirement that the union be given an opportunity to be present during the adjustment of grievances and the limited exception that any such adjustment not contradict a collective-bargaining agreement, but also recognized that employer statements which go beyond merely explaining such changes can constitute unlawful threats. As the Board stated in one case, an employer may not lawfully transform "this limited exception into a general rule" by threatening employees that, for example, "'[i]f a union is certified, you *will* have to deal through Union representatives and may *not* be permitted to go directly to'" the employer itself.[22] As the Board summarized in another case:

> [w]hile an employer may explain that with union representation the union will be a participant in employer-employee relations generally, an employer cannot threaten to retaliate against its employees' selection of a union representative by cutting off the employees' Section 9(a) right to deal directly with management.[23]

B. The Board's Decision in *Tri-Cast* Failed to Explain the Departure from Established Precedent and Has Led to Improper Denials of Section 9(a) Rights.

In *Tri-Cast*, the Board abruptly reversed course from the precedent it had established in the late 1970s and early 1980s. *Tri-Cast* involved objections to a representation election based in part on a letter the employer had sent employees, which stated: "We have been able to work on an informal and person-to-person basis. If the union comes in this will change. We will have to run things by the book, with a

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NLRB 223, 224 (1980), *enforced*, 651 F.2d 502 (7th Cir. 1981); *Sacramento Clinical Laboratory, Inc.*, 242 NLRB 944, 944-45 (1979), *enforcement denied in relevant part*, 623 F.2d 110, 112 (9th Cir. 1980); *Tipton Electric Co.*, 242 NLRB 202, 206, 209 (1979), *enforced*, 621 F.2d 890 (8th Cir. 1980); *Robbins & Myers, Inc.*, 241 NLRB 102, 103-04 (1979) (sustaining election objection), *enforced*, 653 F.2d 237 (6th Cir. 1980), *cert. denied*, 451 U.S. 938 (1981); *C&J Manufacturing Co.*, 238 NLRB 1388, 1392 (1978); *Han-Dee Pak, Inc.*, 232 NLRB 454, 458-59 (1977). *But see Fiber Industries*, 267 NLRB 840, 841 (1983) (overruling election objection concerning alleged misrepresentation of employees' rights where employer also posted a copy of Section 9(a) for employees to read); *TRW-United Greenfield Div.*, 245 NLRB 1135, 1142-43 (1979) (administrative law judge, affirmed by the Board, finding employer statement about union taking away employees' right "to speak for yourselves" to be lawful).

[22] *Mead Nursing Home, Inc.*, 265 NLRB at 1117 (emphasis in original).

[23] *Greensboro News Co.*, 257 NLRB at 701, *overruled*, *Tri-Cast, Inc.*, 274 NLRB at 377 n.5.

stranger, and will not be able to handle personal requests as we have been doing."[24] The Board reversed the Regional Director's determinations that these statements misrepresented employees' rights under Section 9(a) and constituted objectionable conduct warranting a new election. To the contrary, the Board held that the employer's letter, "crafted in layman's terms, simply explicates one of the changes which occur between employers and employees when a statutory representative is selected," and thus constituted "nothing more or less than permissible campaign conduct."[25] The Board overruled the three cases cited by the Regional Director to the extent that they could be read to the contrary.[26] The Board made no mention of the litany of other recent Board decisions holding, often with Court of Appeals approval, that employer statements misrepresenting employees' rights under Section 9(a) constituted unlawful threats or objectionable preelection conduct.[27]

The Board also provided scant explanation in *Tri-Cast* for its decision to abandon established precedent. The statements at issue in *Tri-Cast* were ambiguous inasmuch as the employer stated only that things would "change" and become more formal, and that personal requests would no longer be handled "*as* we have been doing."[28] Because of their ambiguity, the statements might not constitute "misrepresentations," or could be interpreted as lawful references to the added requirements of Section 9(a), such as the need to provide the union with an opportunity to be present in certain situations. Nonetheless, the Board overruled three prior cases involving employers' misrepresentations of Section 9(a),[29] spoke in broad language about an employer's right to explain that "the relationship that existed between the employees and the employer will not be as before,"[30] and ended its discussion by citing a Ninth Circuit opinion for the proposition that: "[I]t is a 'fact of industrial life' that when a union

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[24] 274 NLRB at 377.

[25] *Id.*

[26] *Id.* at 377 & n.5 (overruling *Greensboro News Co.*, 257 NLRB at 701; *Armstrong Cork Co.*, 250 NLRB at 1282; *LOF Glass, Inc.*, 249 NLRB at 428-29).

[27] *See* note 21, *supra*.

[28] *Tri-Cast, Inc.*, 274 NLRB at 377 (emphasis added).

[29] *Id.* at 377 n.4.

[30] *Id.*

represents employees they will deal with the employer indirectly, through a shop steward."[31]

Since *Tri-Cast*, the Board has found that a wide range of employer statements regarding access to management were lawful, typically without any further discussion of the reasoning underlying such conclusions. For example, in *United Artists Theatre Circuit, Inc.*, the Board found an employer's statement that by bringing in a union the employees "will have voted away" their right to "deal directly" with management to be lawful, citing *Tri-Cast* for the proposition that it is "a fact of industrial life that in a union shop the employees deal with the employer indirectly through their union representatives."[32] The Board subsequently upheld an employer's statement that "if the Union got in he would not be able to talk directly to the employees as he had been doing but would have to go to the Union."[33] The Board went on to suggest that any "statement concerning loss of access to management in the event of unionization" is lawful under *Tri-Cast*.[34]

In *SMI Steel, Inc.*,[35] and *Ben Venue Laboratories, Inc.*,[36] the Board extended *Tri-Cast* to find that an employer did not violate the Act by suggesting that it would terminate its open-door policy if the employees voted to unionize. In *Ben Venue*, Member Browning dissented with respect to the alleged Section 8(a)(1) violation,[37]

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[31] *Id.* at 377 (quoting *NLRB v. Sacramento Clinical Laboratory*, 623 F.2d 110, 112 (9th Cir. 1980)).

[32] 277 NLRB 115, 115 (1985) (reversing administrative law judge).

[33] *Koons Ford of Annapolis, Inc.*, 282 NLRB 506, 506 (1986) (reversing administrative law judge).

[34] *Id.*

[35] 286 NLRB 274, 274 (1987) (citing *Tri-Cast*, as well as *Koons Ford of Annapolis* for the proposition that "statements informing employees of a 'loss of access to management'" are not unlawful) (reversing administrative law judge); *see also FGI Fibers, Inc.*, 280 NLRB 473, 473 (1986) (reversing hearing officer to overrule election objection where employer had stated in part that "[a] union would require dealing with our employees through a shop steward, thereby losing personal relationships").

[36] 317 NLRB 900, 900 (1995) (reversing administrative law judge), *enforced*, 121 F.3d 709 (6th Cir. 1997).

[37] *Id.* at 901 (Member Browning, dissenting in part).

distinguishing the cases relied on by the majority and noting that in some earlier cases the Board "did not explain why its holding followed from [previous] cases."[38] Member Browning stated:

> Although I agree with the rationale underlying *Tri-Cast*, I construe that case narrowly. I do not agree that *Tri-Cast* compels us to sanction statements such as the one at issue in the instant case that go beyond merely explicating a change in the relationship between employer and employee, and threaten a total elimination of an employer's established open-door policy. Although Section 9(a) would require a change in an employer's open-door policy, it would not require a termination or suspension of the entire policy.[39]

Nonetheless, the Board continued to apply *Tri-Cast* and its progeny to condone virtually any employer statement forecasting a loss of access to management.[40] For example, in *Dish Network* the Board held that the employer lawfully stated that: "If a workplace is Union, you have to go to your Steward with your complaints, and he decides whether to bring them to the Company's attention, not you."[41] Member Block

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[38] *Id.* (Member Browning, dissenting in part) (referencing *SMI Steel*, 286 NLRB at 274).

[39] *Id.* (Member Browning, dissenting in part) (going on to note that the provisos to Section 9(a) "explicitly provide" that individual employees can continue to present grievances and have them adjusted, and that the provisos "require only that any grievance adjustment not be inconsistent with the terms of a collective-bargaining agreement in effect and that the bargaining representative be given the opportunity to be present at the grievance adjustment").

[40] *E.g.*, *United Rentals, Inc.*, 349 NLRB 190, 191 (2007) (finding lawful employer's statement that employee could come and talk to her directly about work issues as long as "there was nothing in between" them); *Mediplex of Stamford*, 334 NLRB 903, 906 (2001) (administrative law judge, affirmed by the Board, finding that employer did not violate the Act by stating that employees would not be able to talk to management in the same way because "people would have to go through the Union"); *Office Depot*, 330 NLRB 640, 642 (2000) (reversing administrative law judge and finding statement lawful where employer stated that employees would not be able to communicate with management the same way because a union representative "would be the middle person").

[41] 358 NLRB No. 29, slip op. at 1 n.1, 5 (Apr. 11, 2012), *reconsideration denied*, 359 NLRB No. 32 (Dec. 13, 2012).

wrote a concurrence noting that the result was compelled by the Board's existing *Tri-Cast* doctrine, but argued that such doctrine seemed "at odds with the Board's overall treatment of employer predictions about the outcome of unionization," and stated that she was in favor of reexamining *Tri-Cast* in an appropriate future case.[42] The Board majority emphasized that the merits of *Tri-Cast* were not properly before it, and that it was declining to reach that issue.[43] In denying the charging party-union's motion for reconsideration in *Dish Network*, a slightly different Board panel rejected the original majority's conclusion that the issue was not properly before the Board.[44] However, the new panel in *Dish Network* declined to reconsider *Tri-Cast* because it would further delay resolution of that case. Rather, it concluded that a future unfair labor practice case would be a "better vehicle" for reexamining the *Tri-Cast* doctrine.[45]

III. THE BOARD SHOULD USE THE CURRENT CASE TO NARROW ITS APPLICATION OF *TRI-CAST* AND RETURN TO ITS PRIOR RATIONALE

We conclude that this case presents a good vehicle for the Board to reconsider the broad application of its holding in *Tri-Cast*, and to reexamine whether employer statements that misrepresent employees' rights under Section 9(a), or that impliedly threaten employees that they will no longer be able to have a direct relationship with management following their election of a union, are unlawful threats of retaliation under *Gissel* in violation of Section 8(a)(1).[46] As Member Block recognized in her *Dish Network* concurrence, *Tri-Cast* has become a "blunt instrument" used to sanction virtually any employer statement regarding the loss of employee access to management due to unionization,[47] and the Board's existing doctrine "is in tension with the rights accorded employees in the Act" and "serves no clear statutory purpose."[48] Given the employee protections set out in Section 8(a)(1), the intent of

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[42] *Id.* slip op. at 4 (Member Block, concurring).

[43] *See id.* slip op. at 1 n.1.

[44] *Dish Network Corp.*, 359 NLRB No. 32, slip op at 1-3.

[45] *Id.* slip op. at 3-4.

[46] The Division of Advice already has recognized that the Board's existing *Tri-Cast* doctrine is ripe for reexamination. *See Faurecia Interior Systems*, Case 10-CA-112263, Advice Memorandum dated May 8, 2014.

[47] 358 NLRB No. 29, slip op. at 3 (Member Block, concurring).

Congress in specifically amending the Act to ensure that employees do not have to go through their union to communicate with management in certain respects, and the lack of any compelling articulation of the justification for the Board's expansive application of *Tri-Cast*, we would find that certain statements in the present case were unlawful.[49]

We first conclude that the Employer unlawfully threatened employees in its April 24 letter to them. The Employer's [redacted] stated in part that: "The number one difference with a unionized environment is that you will not have the pleasure of working with me or my leadership team directly. You will have to go through the union to have a relationship with us." The reasonable implication of these statements was to threaten that if the Union was voted in, the employees would no longer be able to directly communicate with management or otherwise enjoy the "pleasure" of having an amicable relationship with the Employer. As a result, such statements impliedly misrepresented Section 9(a) and constituted an unlawful threat of retaliation in violation of Section 8(a)(1). The Employer was not merely predicting changes based on objective facts beyond its control—such as the likely negotiation of a contractual grievance procedure or the statutory requirement that the Union be offered an

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[48] *Id.* slip op. at 1 (Member Block, concurring).

[49] Although we do not believe it is necessary for the Board to explicitly overrule the decision in *Tri-Cast* that the statements at issue in that case were lawful, we would question the *Tri-Cast* Board's citation to the Ninth Circuit's decision in *NLRB v. Sacramento Clinical Laboratory*, 623 F.2d at 112, for the proposition that it "is a 'fact of industrial life' that when a union represents employees they will deal with the employer indirectly, through a shop steward." 274 NLRB at 377. This statement constitutes a mischaracterization of the law, given that Congress specifically amended Section 9(a) to ensure that individual employees would not have to go *through* their union to deal with their employer in certain respects. The Ninth Circuit quoted language from the trial examiner's decision in *Bostitch Div. of Textron, Inc.*, 176 NLRB at 379, which in turn cited to *Valencia Baxt Express, Inc.*, 143 NLRB at 217-18, a case that correctly holds a union must receive notice and the opportunity to be *present* during the adjustment of individual grievances, as required by the second proviso to Section 9(a). *Cf. LOF Glass, Inc.*, 249 NLRB at 428 n.4 ("Sec. 9(a) recognizes the compatibility of the employees' right to present grievances and the union's opportunity to have a representative present."), *overruled*, *Tri-Cast, Inc.*, 274 NLRB at 377 n.5. Two years later, the Ninth Circuit enforced a Board decision reaching a contrary result. *See NLRB v. Dick Seidler Enterprises*, 666 F.2d 383, *enforcing sub. nom.*, *Joe & Dodie's Tavern*, 254 NLRB at 411 (finding that employer's statements that union would do all employees' talking for them and that employer would be required to deal solely "through" the union constituted erroneous statements of the law and thus was an unlawful "clear threat of loss of benefit").

opportunity to be present during the adjustment of individual grievances—but was threatening employees with the revocation of an important benefit, i.e., the ability to communicate with management directly that Congress explicitly carved out for individual employees to retain. Furthermore, the Employer not only impliedly misrepresented Section 9(a)—by suggesting that employees would have to go "through the union" to communicate with management—but also threatened that unionization would result in a less harmonious relationship with management in general.

We next conclude that the Employer's [redacted] unlawfully threatened employees at mandatory captive-audience meetings on June 30 or July 1. According to employee testimony, the Employer's [redacted] told employees that if they elected the Union, employees could no longer have a direct personal working relationship with the Employer, that everything would be filtered through the Union, and that employees would no longer be able to talk to the Employer's [redacted] or any of the other management staff without the Union being present. As discussed above, the introduction of an exclusive bargaining representative does not preclude employees from having a direct relationship with their employer—neither with respect to the presentation and adjustment of grievances permitted by Section 9(a), nor with respect to a personal working relationship more generally. The Employer's suggestion that everything would be filtered through the Union reasonably implied that employees would lose their right to directly communicate grievances or other concerns to management, contrary to Section 9(a). Similarly, the Employer's statement that employees would no longer be able to talk to management without the Union being present misstated the law in two respects: first, by suggesting that employees would be restricted in talking to management about any topic whatsoever; and second, by misrepresenting the second proviso to Section 9(a), which only requires that the union be given the opportunity to be present during the adjustment of grievances.[50]

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[50] The Employer's [redacted] provided testimony concerning the contents of [redacted] remarks based on reference to [redacted] prepared notes for the mandatory meetings, but in finding a violation we do not rely on the specific language that [redacted] recalls using. The Region also requested advice regarding statements by the Employer's [redacted] during these meetings that the Union organizing committee wanted to be the employees' new bosses. Given the broader context of these additional statements and their ambiguous nature, we do not find that they constituted unlawful threats regarding access to management. With respect to the Employer's early July letter, we conclude that the Employer's [redacted] statement that the Union "will drive a wedge between my leadership and you" did not constitute an unlawful threat regarding employee access to management, but instead was a reference to the alleged negative characteristics of the Union discussed elsewhere in the letter.

In sum, because the Employer's statements were unlawful threats of loss of benefits that involved misrepresentations not privileged by Section 8(c), they violated Section 8(a)(1). To the extent that *Tri-Cast* and its progeny may dictate a different result, we would urge the Board to reexamine its application of those decisions.

IV. THE EMPLOYER UNLAWFULLY PROMISED ITS EMPLOYEES BENEFITS IF THEY REJECTED UNION REPRESENTATION

We further conclude that the Employer made unlawful promises of benefit in its April 24 and May 21 letters to employees. An employer's promises of benefits "made in the course of urging employees to reject unionization are unlawful because they link improved conditions to defeat of the union."[51] In the April 24 letter, the Employer's [redacted] noted [redacted] ongoing efforts to "create the changes" that many employees wanted, asked employees if they "like[d] what [they] heard," and then suggested that employees reject the Union in order to "allow [the Employer] the opportunity to have that direct relationship with you." The Employer's [redacted] continued by more directly stating that [redacted] would not be able to implement the desired changes if the Union was voted in, "because the union will be in between you and me." In context, we find that these statements constituted unlawful promises of benefits contingent on employees rejecting the Union, in violation of Section 8(a)(1).

Similarly, in the May 21 letter, the Employer's [redacted] began by stating that [redacted] did not believe it was "in the best interest of our future employees and our company to have an outsider come between us," and that the Union "would not improve how we treat our employees, but instead, could be divisive." The letter continued by noting that the Employer intended "to remain union-free by responding to your needs and concerns," would be seeking employee input on ways to improve working conditions, and might only have the "opportunity to work with you to make the necessary changes to improve how the site is managed" in the absence of the Union. Given the tenor of the letter as a whole, we find that the Employer's references to "work[ing] with" employees and "improv[ing] how we treat our employees" constituted unlawful promises of benefits in violation of Section 8(a)(1). The Region requested advice as to whether these statements from the Employer's April 24 and May 21 letters constituted unlawful threats misconstruing Section 9(a), but given the broader context we instead find that such statements impliedly promised employees benefits if they rejected the Union.[52]

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[51] *DynCorp*, 343 NLRB 1197, 1198 (2004), *enforced*, 233 F. App'x 419 (6th Cir. 2007); *see also Reno Hilton*, 319 NLRB 1154, 1155-56 (1995).

[52] Since we conclude that the Region should issue complaint alleging that these additional statements constituted unlawful promises of benefit, we need not decide

Accordingly, the Region should issue complaint alleging that certain statements by the Employer, as discussed above, constituted unlawful threats of retaliation concerning employee access to management, and that other statements constituted unlawful promises of benefits concerning improved working conditions, in violation of Section 8(a)(1).[53]

/s/
B.J.K.

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whether, in a different context, the specific language used by the Employer could constitute an unlawful threat concerning access to management.

[53] Our conclusion regarding the unlawfulness of the above statements is further supported by the Region's finding of other unfair labor practices that occurred during the Employer's campaign against the Union. *See, e.g.*, *Harrison Steel Castings Co.*, 293 NLRB 1158, 1159 & n.4 (1989) (finding that background of other unlawful conduct can provide significant context for evaluating the lawfulness of an employer's statements), *petition for review dismissed*, 923 F.2d 542 (7th Cir. 1991). However, in urging the Board to reconsider its application of *Tri-Cast*, we do not suggest that employer statements regarding diminished employee access to management can constitute unlawful threats *only* in the presence of other unlawful conduct.